

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of
SCHERING-PLOUGH CORPORATION,
a corporation,
UPSHER-SMITH LABORATORIES,
a corporation,
and
AMERICAN HOME PRODUCTS
CORPORATION,
a corporation.

Docket No. 9297

TO: The Honorable D. Michael Chappell
Administrative Law Judge

**NON-PARTY KV PHARMACEUTICAL COMPANY'S
REQUEST FOR LEAVE TO FILE A REPLY BRIEF**

KV Pharmaceutical Company requests leave to file a short reply brief in support of its Motion to Amend Protective Order. Since KV is not a party to this proceeding, it has not had any access to any of the documents, deposition transcripts, or other discovery materials generated in this matter, and can only respond to materials placed in the public file. KV

therefore requests a reply in order to respond to the defenses raised in Upsher-Smith's opposition briefs.

DATED: June 8, 2001

Respectfully submitted,


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**NON-PARTY KV PHARMACEUTICAL COMPANY'S
REPLY BRIEF IN SUPPORT OF ITS MOTION
TO AMEND PROTECTIVE ORDER**

In its opposition to KV's Motion to Amend Protective Order, Upsher-Smith leaves much uncontested. KV showed, and Upsher-Smith did not deny, that the documents KV produced during the investigative stage include materials of the highest sensitivity and of "critical strategic importance." See Mariani Declaration, ¶¶ 2-3. Furthermore, it is uncontested that KV has been diligent in preserving the confidentiality of these proprietary documents. See id. at ¶ 4. Nor does Upsher-Smith contest the principle that as a matter of law and FTC policy, non-party documents should receive the highest level of protection, both to avoid harming an innocent

bystander to the dispute and to encourage public cooperation with future FTC investigations.

See In the Matter of Kaiser Aluminum & Chem. Corp., 103 F.T.C. 500 (1984).

Upsher-Smith's argument instead focuses on attempting to prove that Upsher-Smith's "Vice President of Scientific Affairs" does not have any of the job responsibilities that the title implies. See Upsher-Smith's Opposition to Complaint Counsel's Motion to Amend the Protective Order, p. 5 ("Admittedly, Mr. Robbins's title of Vice President of Scientific Affairs is not particularly descriptive of his responsibilities."). Mr. Robbins's declaration, however, does not support such a sweeping claim. Mr. Robbins claims not to have any "*direct* role or oversight" regarding product research and development, (Robbins Dec., ¶ 9 (emphasis added)), but he makes it clear that he closely monitors and advises those who do. Id., ¶ 7 ("I advise on clinical trials"); id., ¶ 10 ("I advise Upsher-Smith on the legal aspects of safety and efficacy issues that arise during these clinical trials"); id., ¶ 12 ("I advise the company to ensure that Upsher-Smith's products are being developed and maintained safely"). These activities might all be unfairly aided by detailed knowledge of KV's methods for conducting clinical trials, KV's research efforts, and the issues arising therefrom.

"[KV's] documents describe how we make our products, and how we are trying to make them better. The documents also indicate what products we will sell in the future, how we intend to make those products, the research issues we have encountered, and issues that need to be overcome before the eventual product launch. Dissemination of this information to actual or potential competitors is likely to result in substantial competitive harm."

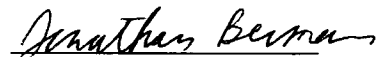
Mariani Dec., ¶ 3. Moreover, Mr. Robbins's declaration is silent regarding whether he has input into Upsher-Smith's decisions regarding which products to develop, a decision process that could be unfairly aided by knowledge regarding KV's current and planned products. Even with a good faith effort, when Mr. Robbins gives advice regarding research and clinical trial efforts, it

will be next to impossible for him "to compartmentalize and selectively suppress information once learned" Sullivan Marketing, Inc. v. Valassis Comm., Inc., 1994 WL 177795, *3 (S.D.N.Y. 1994), quoting F.T.C. v. Exxon Corp., 636 F.2d 1336, 1350 (D.C. Cir. 1980).

Where the circumstances merit, courts have entered protective orders far more restrictive than the modification proposed here. E.g. Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1345-46 (7th Cir. 1986). KV urges that its motion be granted, and the Protective Order be modified to shield KV's competitive information from the Vice President of Scientific Affairs of Upsher-Smith, one of KV's rivals.

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CERTIFICATE OF SERVICE

I hereby certify that today I caused a copy of the attached documents, entitled Non-Party KV Pharmaceutical Company's Request for Leave to File a Reply Brief and Non-Party KV Pharmaceutical Company's Reply Brief in Support of its Motion to Amend Protective Order to be delivered by facsimile and U.S. Mail to:

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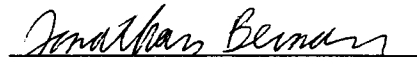
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and delivered, by hand to the

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Jonathan Berman
Jones, Day, Reavis & Pogue

DATED: June 8, 2001